

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
(240) 777-6600

www.montgomerycountymd.gov/content/council/boa/board.asp

Case No. A-5775

APPEAL OF L. AHMED AWAN

RESOLUTION TO DENY MOTION FOR RECONSIDERATION

(Resolution Adopted February 12, 2003)

(Effective Date of Resolution: April 9, 2003)

The Board of Appeals has received a Motion for Reconsideration, dated February 7, 2003, from Malcolm F. Spicer, Jr., Assistant County Attorney, on behalf of Montgomery County, Maryland. Mr. Spicer requests that the Board reconsider its opinion of January 28, 2003 denying the above-captioned administrative appeal. The basis for his request is the interpretation of Section 59-C-4.347 of the Montgomery County Code.

The subject property is located at 649 East University Boulevard, Silver Spring, Maryland, in the C-1 Zone.

The Board of Appeals considered Montgomery County's Motion for Reconsideration at a Worksession on February 12, 2003. Rule 10.1.2 of the Board of Appeals Rules of Procedure [Council Resolution No. 12-865, October 27, 1992], provides pertaining to grounds for reconsideration of decisions on special exceptions:

The Board may grant reconsideration only on evidence of changed circumstances, new evidence that could not reasonably have been presented at the original hearing, or if some mistake or misrepresentation was made at the original hearing that requires rehearing and re-argument in order to be corrected.

The Board finds nothing in the Motion which constitutes evidence of changed circumstances or which could not reasonably have been presented at the hearing on the administrative appeal. Therefore,

On a motion by Allison Ishihara Fultz, seconded by Donna L. Barron, with Angelo M. Caputo, Louise L. Mayer and Donald H. Spence, Jr., Chairman in agreement:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that Montgomery County's Motion for Reconsideration, dated February 7, 2003, in Case No. A-5775, Appeal of Ahmed Awan, is **denied**.

Donald H. Spence, Jr.
Chairman, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 9th day of April, 2003.

Katherine Freeman
Executive Secretary to the Board

NOTE:

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure.

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Case No. A-5775

APPEAL OF L. AHMED AWAN

OPINION OF THE BOARD

(Hearing Date: October 23, 2002)

(Effective date of Opinion: January 28, 2003)

Case No. A-5547 is an administrative appeal in which the appellant charges administrative error on the part of the Department of Permitting Services (DPS) in its issuance of a Notice of Violation (NOV) dated April 11, 2002.

A public hearing was held pursuant to Section 59-A-4.3 of the Zoning Ordinance. Assistant County Attorney, Malcolm Spicer, represented Montgomery County, Maryland. Ellis Koch, Esq. appeared on behalf of the appellant, Ahmed Awan. Antonio Franco, Esq. appeared on behalf of Victor Castro, a managing member of Castro Enterprises, owner of the subject property.

Decision of the Board: Administrative appeal **granted**.

EVIDENCE PRESENTED TO THE BOARD

1. Appellant operates an automotive repair facility known as "Nationwide Engine & Transmission" (Nationwide) which is located at 649 East University Boulevard, Silver Spring, Maryland in the "C-1" (commercial) zone. The property is currently owned by Castro Enterprises, who purchased the property in approximately January, 2002.

2. Beginning on or about May, 1961, through March or April of 1999, another automotive repair facility known as "Al's Transmission" operated at the property. (See Exhibit 15, final inspection for the Al's Transmission use and occupancy certificate dated May 19, 1961) During a portion of that time, from April, 1998 until January 2002, the property was owned by Jin Kim of Potomac, Maryland. Ms. Kim testified that as the former owner and landlord of Al's Transmission, she is certain that Al's Transmission ceased operations at the end

of March 1999. Ms. Kim also testified that the property was vacant about one and one-half years after Al's Transmission ceased operations.

3. On or about September, 2000, Nationwide began operations as an automotive repair facility under the mistaken impression that it had a certificate of occupancy. Although Nationwide had applied to DPS for a use and occupancy permit, DPS had denied the application. Nationwide had filed a "certificate of registration" with the County Department of Consumer Affairs and believed that such filing constituted County "approval" to operate. When Nationwide realized its mistake, it applied again for a use and occupancy permit on or about April 19, 2002.

4. DPS issued an NOV to Nationwide on April 10, 2002 for operating a commercial business without a valid use and occupancy certificate and for operating a business that is not permitted in the C-1 commercial zone.

5. Mr. Awan appealed from the NOV and the second denial of the use and occupancy permit on May 14, 2002.

FINDINGS OF THE BOARD

1. DPS contends that the automotive repair facility is not a permitted use in the C-1 zone under the table of uses in the County Zoning Ordinance, specifically Section C-4-8. While it concedes that the business may have once operated as a legal non-conforming use, it claims that this use was abandoned no later than April, 1999 when Al's Transmission ceased operations. Section 59-G-4.14 of the Zoning Ordinance states that "[i]f a nonconforming use is abandoned, it must not be reestablished. A nonconforming use is abandoned if the nonconforming use stops for at least 6 months." The evidence of record indicates that the automotive repair facility use was abandoned for more than 6 months when Al's Transmission ceased operations; in fact, it was probably abandoned for approximately one-and-one-half years.

2. Under the above reasoning, Nationwide could not possibly obtain a certificate of occupancy and the appeal would have to be denied. However, the Board must also consider the application of Section 59-C-4.347 of the Zoning Ordinance. This section provides in pertinent part:

"59-C-4.347. Nonconforming uses, amendment of 1971.

Any use which is not permitted in the C-1 zone but was lawfully existing prior to the amendment of the C-1 zone on March 26, 1971, shall not be regarded as a nonconforming use;. . ."

The evidence of record indicates that the automotive repair facility use operated prior to March 26, 1971, even as early as 1961. Since it operated at that time as a use that existed lawfully previous to being classified as not permitted in the C-1 Zone, it was "lawfully existing". Under the unambiguous language of this provision, any use which was legally existing shall not be regarded as nonconforming. Thus, because it legally existed prior to March 26, 1971 as a lawful non-conforming use, the Nationwide automotive repair facility cannot be regarded as nonconforming, and can be re-established.

3. Thus, the NOV was improperly issued under this provision of the Zoning Ordinance, and the appeal is, therefore, **granted**.

On a motion by Louise L. Mayer, seconded by Allison Ishihara Fulz, with Board members Angelo M. Caputo, Donna Baron and Donald H. Spence, Jr., Chairman in agreement, the Board adopts the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above be adopted as the Resolution required by law as its decision on the above entitled petition.

Donald H. Spence, Jr.
Chairman, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 28th day of January, 2003.

Katherine Freeman
Executive Secretary to the Board

NOTE:

Any request for rehearing or reconsideration must be filed within ten (10) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 2-A-10(f) of the County Code).

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County in accordance with the Maryland Rules of Procedure.